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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH FEOLA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (Apps. A and B, *infra*) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1973 (App. C, *infra*). On December 11, 1973, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including January 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for conspiracy to violate a federal law, it is necessary to prove the defendant's knowledge of a jurisdictional element, when such knowledge need not be shown in a prosecution for the underlying substantive offense.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more that $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 111 provides:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more that $5,000 or imprisoned not more than three years, or both.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, re-

spondent and three co-defendants were convicted of assaulting federal narcotics officers while the officers were engaged in the performance of their official duties, in violation of 18 U.S.C. 111, and of conspiring to commit that offense, in violation of 18 U.S.C. 371.[1] Respondent was sentenced to imprisonment for one to four years on the conspiracy count, to be followed by a three year probation term on the substantive charge; he was also fined $3,000 on the substantive count. On appeal, the court of appeals initially reversed both convictions (App. A; *infra*). Thereafter, upon rehearing, it reinstated the conviction on the substantive count (App. B, *infra*). This petition seeks review of the reversal of the conspiracy conviction.[2]

1. The prosecution arose from a scheme hatched by respondent and his co-defendants to defraud or rob prospective purchasers of heroin. Unknown to the conspirators, their intended victims were undercover federal narcotics agents.

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[1] Petitioner's three co-defendants, Enriquito Alsondo, Henry Rosa, and Michael Farr, were also convicted on both counts. In addition, Alsondo was also convicted of carrying a deadly weapon during the commission of a felony, in violation of 18 U.S.C. 924(c)(2).

[2] While the court below also reversed the conspiracy convictions of respondent's three co-defendants (co-defendant Farr's appeal was prosecuted separately—see *United States* v. *Farr*, C.A. 2, No. 73-1797, decided November 19, 1973), we do not petition for a writ of certiorari in those cases because the three co-defendants were given concurrent prison terms on the substantive and conspiracy counts. Co-defendant Farr is petitioning the court to review the substantive conviction under Section 111. *Farr* v. *United States*, No. 73-953.

On August 21, 1971, narcotics agent Hall, while working in an undercover capacity, met co-defendant Farr through an informer. Hall agreed to purchase a kilogram of heroin, to be supplied by respondent. Several days later, Hall, undercover agent Lightcap, the informer, and co-defendants Rosa and Farr went to a Manhattan apartment where, the agents were told, co-defendant Alsondo and respondent would be waiting to transact the sale. Hall displayed a roll of bills, which he claimed to be the $17,000 purchase price. Alsondo, Rosa, and Farr then took Hall and the informer into the apartment bedroom, where they displayed packages of white powdered sugar, which Alsondo said was heroin.

At this point, Farr, Rosa, and Alsondo left the room, whereupon Hall, on opening a closet door, discovered a man gagged and bound.[3] Hall then proceeded to the hallway, where he observed Alsondo begin to pull a revolver from his rear waistband. Hall shouted a warning to Lightcap, and they identified themselves as federal agents. After a scuffle, the two agents managed to subdue Alsondo; Lightcap then went into the living room, whereupon Rosa threw himself at the agent as if to flee. Rosa was apprehended, along with Farr, who had remained in the kitchen. Respondent, who had been portrayed to the agents as the supplier of the drugs, was discovered hiding in a closet and was also arrested.[4]

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[3] That man was later determined to be the apartment tenant.

[4] Respondent's address book, seized upon his arrest, contained the telephone numbers of Alsondo, Farr, and the Manhattan apartment in which the attempted robbery of the federal agents occurred.

2. The conspiracy count was submitted to the jury on the theory that an agreement among the defendants could be inferred under which they would either defraud the agents by selling sugar for $17,000, or assault and rob the agents should the fraud be discovered.[*] Without objection, the trial court instructed the jury that it was not necessary on either count for the government to prove that respondent or his co-conspirators knew that their victims were federal officers. Although it recognized that knowledge that the victim of an assault is a federal officer is not essential for a substantive conviction under 18 U.S.C. 111, the court of appeals nonetheless ruled, *sua sponte*, that such knowledge was required to support a conviction for *conspiring* to assault a federal officer.

The court believed that this conclusion was compelled by its 1941 decision in *United States* v. *Crimmins*, 123 F. 2d 271 (L. Hand, J.). In that case, the Second Circuit had held that, even though a defendant could be guilty of causing the interstate transportation of stolen securities without knowing of their interstate transportation, such knowledge was required to support a conviction for *conspiring* to transport stolen securities in interstate commerce. In the instant case, the court of appeals said (App. A, *infra*, p. 23):

> *Crimmins* and its progeny mandate the view that specific knowledge of the official federal capacity of assault victims must be proved to

[*] Of course, a conspiracy, being secretive in nature, need not be proven by direct evidence but may be inferred from circumstantial evidence. *Glasser* v. *United States*, 315 U.S. 60, 80.

establish conspiracy to violate Section 111, though such proof is unnecessary to convict for the substantive offense. * * *

Although the court recognized that "[t]he *Crimmins* rationale has been criticized * * *" (App. A, *infra*, p. 22), it nevertheless accepted *Crimmins* as controlling precedent, albeit "somewhat reluctantly" (App. A, *infra*, p. 24).[*]

REASONS FOR GRANTING THE WRIT

It is wholly illogical to require knowledge of a federal jurisdictional element in a conspiracy prosecution, when such knowledge need not be shown in a prosecution for the underlying substantive offense. Whatever state of knowledge must be proved to establish perpetration of the substantive offense, proof of the same state of knowl-

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[*] In its first opinion, the court below also reversed respondent's substantive conviction under Section 111. Because respondent had not personally participated in the assault upon the agents, the court reasoned that his liability rested solely upon the principle that a conspirator is liable for the acts of his co-conspirators done in furtherance of the illicit plan. See *Pinkerton* v. *United States*, 328 U.S. 640, 647. A "*Pinkerton* instruction" had been given the jury. Since the court deemed the conspiracy conviction to be invalid, it held that the substantive conviction based upon the conspiracy charge similarly had to fall (App. A, *infra*, p. 26). On reconsideration of this issue on rehearing, the substantive assault conviction of respondent was affirmed (App. B, *infra*). The court noted in its second opinion that although respondent, under *Crimmins*, could not be guilty of a federal conspiracy to assault federal officers, he was nonetheless guilty as a joint criminal venturer of assaulting certain individuals, and thus, being legally responsible for the acts of his co-venturers, he was guilty of the substantive assault upon federal officers, which requires no specific knowledge of the victims' status.

edge, together with proof of an agreement to do acts constituting the substantive offense and an overt act in furtherance of that agreement, should suffice in a conspiracy prosecution. The creation of a different and more burdensome standard of proof with respect to this element for conspiracy charges distorts and misapplies the philosophical underpinnings of the offense of conspiracy and its accepted role in the overall scheme of American criminal jurisprudence.

The *Crimmins* rule was promulgated by a distinguished jurist, who was misled by a seductive analogy. Although it has been criticized by commentators[7] and has been rejected in some circuits, it has been retained in others out of respect for that jurist's formidable reputation. Because the circuits are in conflict over the continued validity of the rule and because it imposes a serious, irrational and unnecessary burden on federal conspiracy prosecutions, review by this Court is warranted.

1. There is a conflict among the circuits that should be resolved by this Court. The *Crimmins* rule is old, but it has not been universally followed. The Fifth, Sixth and Eighth Circuits have followed *Crimmins* and require proof of knowledge of the jurisdictional element in conspiracy cases, even though such knowledge is not an element of the substantive offense. See *United States* v. *Iacovetti*, 466 F. 2d 1147 (C.A. 5); *United States* v. *Cimini*, 427 F. 2d 129 (C.A. 6); *Nassif* v. *United States*, 370 F. 2d 147 (C.A. 8).

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[7] *E.g.*, *Developments in the Law, Criminal Conspiracy*, 72 Harv. L. Rev. 920, 938–940 (1959).

The Third, Seventh and Ninth Circuits have rejected the *Crimmins* rule. See *United States* v. *Iannelli*, 477 F. 2d 999 (C.A. 3), petition for a writ of certiorari pending, No. 73–64; *United States* v. *Polesti*, No. 73–1294, decided August 21, 1973 (C.A. 7), petition for writ of certiorari pending, No. 73–5489;[8] *Wilkerson* v. *United States*, 41 F. 2d 654 (C.A. 7), certiorari denied, 282 U.S. 894; *United States* v. *Roselli*, 432 F. 2d 879 (C.A. 9), certiorari denied, 401 U.S. 924.

2. Federal courts have uniformly held that knowledge that an assault victim is a federal officer need not be shown in a prosecution under 18 U.S.C. 111. See *United States* v. *Maynard*, 452 F. 2d 1087 (C.A. 1); *United States* v. *Ulan*, 421 F. 2d 787 (C.A. 2); *United States* v. *Goodwin*, 440 F. 2d 1152 (C.A. 3); *United States* v. *Wallace*, 368 F. 2d 537 (C.A. 4), certiorari denied, 386 U.S. 976; *United States* v. *Young*, 464 F. 2d 160 (C.A. 5); *United States* v. *Kiraly*, 445 F. 2d 291 (C.A. 6), certiorari denied, 404 U.S. 915; *United States* v. *Ganter*, 436 F. 2d 364 (C.A. 7); *United States* v. *Leach*, 429 F. 2d 956 (C.A. 8), certiorari denied, 402 U.S. 986 (*dictum*); *United States* v. *Kartman*, 417 F. 2d 893 (C.A. 9). Moreover, the courts of appeals have consistently rendered similar rulings

[8] *Polesti* was decided in an unpublished order (a copy of which we are serving on respondent's counsel) and is therefore not necessarily controlling on other panels of the Seventh Circuit. It is clear, however, that it reflects the law of that circuit. Thus, in *United States* v. *Thompson*, 476 F. 2d 1196, the Seventh Circuit strongly criticized *Crimmins*, although it did not find it necessary at that time explicitly to reject it, because the proof in the case showed knowledge of the jurisdictional element.

respect to numerous other offenses requiring the ice of an interstate commerce or federal prop- nexus, some examples of which are set forth in otnote below.[8]

U.S.C. 2312 (interstate transportation of a stolen vehicle g it to be stolen): Knowledge by a defendant that he state lines is not necessary. *Bibbins* v. *United States*, 400 4 (C.A. 9)

.S.C. 2313 (receiving stolen vehicle moving in interstate ce knowing it to have been stolen): Proof of knowledge e vehicle has moved across state lines is not necessary. v. *United States*, 405 F.2d 168 (C.A. 5); *Pilgrim* v. *States*, 266 F.2d 486 (C.A. 5); *Brubaker* v. *United* 183 F.2d 894 (C.A. 6); *United States* v. *Hamilton*, 456 1 (C.A. 3), certiorari denied, 406 U.S. 947.

.S.C. 2314 (interstate transportation of stolen goods g them to be stolen): Knowledge that the goods state lines is unnecessary. *United States* v. *Kierschke*, d 315 (C.A. 6); *United States* v. *White*, 451 F.2d 559 3), certiorari denied, 405 U.S. 4071; *United States* v. *r*, 424 F.2d 710 (C.A. 2); *United States* v. *Strauss*, 443 86 (C.A. 1), certiorari denied, 404 U.S. 851; *United* . *Masters*, 456 F.2d 1060 (C.A. 9); see *United States* v. *Szo*, 174 F.2d 177 (C.A. 2), certiorari denied, 338 U.S. predecessor statute).

.S.C. 2315 (receiving goods moving as part of interstate ce knowing them to be stolen): Knowledge that the ere moving in interstate commerce is unnecessary. *Pugli- United States*, 348 F.2d 902 (C.A. 1), certiorari denied, 3. 939; *United States* v. *Allegretti*, 340 F.2d 243 (C.A. iorari denied, 381 U.S. 911; *Corey* v. *United States*, 305 2 (C.A. 9), certiorari denied, 371 U.S. 956.

.S.C. 2113(c) (receiving money taken from a federally i bank): Knowledge that the money was from a federally i bank is unnecessary. *Nelson* v. *United States*, 415 F.2d 4A. 5), certiorari denied, 396 U.S. 1060.

.S.C. 641 (theft and receipt of property of the United S Knowledge that property knowingly converted belongs

The rationale for this rule is that the federal or interstate commerce nexus is logically no part of the crime itself, but is included in the statute merely as a ground for establishing or defining the extent of exercise of federal jurisdiction. The essence of the crimes lies in their other elements, *e.g.*, assault, robbery, theft, or knowing possession of stolen property. Nothing is added to the guilt of the defendant by reason of the fact that a victim happens to be a federal officer, or a bank federally insured, or a state line crossed. There is consequently no reason at all why guilt under the statute should turn upon *knowledge* of that element. If that element is in fact present, the requirements of federal jurisdiction are satisfied; no purpose of the statute is advanced by requiring, in addition, that the perpetrator know of its presence. Cf. *Blassingame* v. *United States*, 427 F. 2d 329, 330 (C.A. 2), certiorari denied, 402 U.S. 945.

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to the government is unnecessary. *United States* v. *Howey*, 427 F.2d 1017 (C.A. 9); *United States* v. *Boyd*, 446 F.2d 1267, 1274 (C.A. 5); cf. *Findley* v. *United States*, 362 F.2d 921 (C.A. 10).

18 U.S.C. 659 (possession or receipt of goods stolen from an interstate shipment): Knowledge that goods were stolen specifically from interstate shipment unnecessary. *United States* v. *Allegretti*, 340 F. 2d 243 (C.A. 7), certiorari denied, 381 U.S. 911; *United States* v. *Vilhotti*, 452 F. 2d 1186 (C.A. 2), certiorari denied, 406 U.S. 947.

18 U.S.C. 1952 (travel in or use of facilities of interstate commerce to facilitate an unlawful activity): Knowledge that interstate facilities were used is unnecessary. *United States* v. *Bash*, 258 F. Supp. 807 (N.D. Ipd.), affirmed *sub nom. United States* v. *Miller*, 379 F.2d 483, 487 (C.A. 7), certiorari denied, 389 U.S. 930; *United States* v. *Roselli*, 432 F.2d 879 (C.A. 9), certiorari denied, 401 U.S. 924; *United States* v. *Hanon*, 428 F.2d 101 (C.A. 8), certiorari denied, 402 U.S. 952.

In *United States* v. *Crimmins*, *supra*, Judge Learned Hand proposed a different rule for conspiracies to violate substantive federal laws. Crimmins was charged with conspiring to transport stolen securities in interstate commerce, knowing them to be stolen (18 U.S.C. (1940 ed.) 415). Judge Hand accepted as a premise that an accused need not be shown to have known the stolen securities had been transported in interstate commerce in order to support a conviction under the substantive statute, but concluded that one could not be guilty of *conspiring* to transport such securities in interstate commerce unless he knew, or at least had reason to suppose, that the securities would be so transported. Judge Hand supported his conclusion with his now famous traffic light analogy (123 F. 2d at 273):

> While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light for one cannot agree to run past a light unless one supposes that there is a light to run past.

While it is superficially compelling, the analogy fails because it posits the core criminal conduct, in the place of the jurisdictional element, as the item with respect to which *mens rea* is required. Had the crime and the jurisdictional element been separated, the analogy would have supported just the opposite conclusion. Thus if one spoke of running past a red light on an Indian reservation, where it was planned to disobey the light, but the conspirators were in ignorance of the existence of the reservation, it would

seem clear that one could both commit and agree to commit the offense, without knowing that the light was located on a reservation.

Analogies aside, the *Crimmins* rule rests on two erroneous assumptions. It assumes that the jurisdictional element of a federal crime provides the basis for punishment, and it assumes that to violate federal law the terms of a conspiracy must include a specific agreement that federal, as opposed to state, law be violated. Neither assumption is well founded. As we have noted in respect to violations of substantive federal laws, the jurisdictional element is no part of the crime itself, but constitutes simply the constitutional predicate for imposition of the federal investigative, prosecutorial, and judicial apparatus upon particular areas of criminal activity. If knowledge of the jurisdictional element is not part of the substantive crime, there is no reason why it should be a necessary part of a conspiracy. As cogently put by the Ninth Circuit in rejecting the *Crimmins* rule (*United States* v. *Roselli*, *supra*, 432 F. 2d at 891–892):

> The essence of the offense under the general conspiracy statute, 18 U.S.C. § 371, is an agreement by two or more persons to commit the substantive crime. In virtually all cases the meeting of minds is established simply by inference from a concert of action that produces the forbidden result. There is no apparent reason for requiring not only proof of a concert of action that includes all elements of the substantive offense, but also proof of knowledge of the jurisdictional element that is not required for conviction of the substantive offense.

A second erroneous assumption in *Crimmins* is that because an illegal "agreement" is involved, every element encompassed by the scheme must be known to the participants, and that to exclude the jurisdictional element from the requirement of knowledge is to expand unjustly the scope of the agreement beyond its terms (123 F. 2d at 273):

> It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding. [Citations omitted.] And this is equally true, when the crime which the conspirators have agreed upon, is one of which they severally might be guilty though they were ignorant of the existence of some of its constituent facts. * * *

But if two or more persons may be joint principals in the commission of a federal substantive offense without knowledge of a jurisdictional element (see App. B, *infra*, pp. 29–32), it is not an expansion of their original design to charge them with conspiracy to commit that offense.

The argument that an expansion of the conspiracy is involved seem to be based upon the mistaken belief that the individual conspirator must entertain knowledge of each and every detail of the illicit agreement. Yet this notion is contrary to prevailing judicial views as to the nature of conspiracy. Indeed, as this Court noted in *Blumenthal* v. *United States*, 332 U.S. 539, 557, conviction for conspiracy may rest solely upon a showing of understanding of the general plan

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"* * * without requiring evidence of knowledge of all its details or of the participation of others." Similarly, the individual conspirator is held responsible for all the acts of his co-conspirators performed in the furtherance of the agreement, whether or not the conspirator knows of their having been performed. See *Pinkerton* v. *United States*, 328 U.S. 640, 647.

The fundamental function of the law of conspiracy is to impose sanctions against persons who agree with one another to perform acts which, if performed, would constitute violations of the criminal laws. Respondent and his co-conspirators were found by the jury to have agreed to steal money from, and if necessary assault, certain individuals. When they attempted to carry out this agreement, they committed an unlawful assault upon federal officers punishable under 18 U.S.C. 111. The actions constituting this offense were the precise ones agreed upon by the conspirators. To hold that they may not be punished for violation of the federal conspiracy law on the grounds relied upon below thus wholly distorts the nature and function of that prohibition.

3. Although doing so "somewhat reluctantly" (App. A, *infra*, p. 24), the court below accepted *Crimmins* as "controlling precedent." Moreover, the Second Circuit has made it clear in a series of *sua sponte* applications of the *Crimmins* rule that it intends to apply the rule to all federal criminal conspiracies (see App. A, *infra*, p. 24; *United States* v. *Houle and Diodato*, C.A. 2, No. 72–1492, decided December 27, 1973; *United States* v. *De Marco*, C.A. 2, No. 73–1768, decided December 12, 1973; *United States* v. *Vilhotti*, 452 F. 2d

1186 (C.A. 2), certiorari denied, 406 U.S. 947). This has been done despite cogent criticism of the rule. See, *e.g., Developments in the Law, Criminal Conspiracy,* 72 Harv. L. Rev. 920, 938–940 (1959). The *Final Report of the National Commission on Reform of Federal Criminal Laws* (1971) has explicitly disavowed the notion that a conspirator must have knowledge of the jurisdictional element. See Sections 203, 204, and 1004 of the *Final Report.* However, enactment of a new federal criminal code is at least five years away. In the meantime the *Crimmins* rule imposes a serious and unwarranted burden on federal conspiracy prosecutions.

It is true that most federal conspiracy charges are joined with substantive charges, and it is common that, if convictions are procured on both counts, the sentence imposed on the conspiracy count is concurrent with that on the substantive count (although this did not happen in respondent's case). But this should not obscure recognition of the fact that the issue presented is of considerable practical importance to the administration of criminal justice. Most obviously, the *Crimmins* rule interposes substantial obstacles in the way of prosecution of unconsummated conspiracies, where the substantive offense may have been blocked by alert law enforcement. Similarly, in cases involving a jurisdictional amount (*e.g.,* 18 U.S.C. 2314 and 2315, prohibiting transportation or receipt of stolen goods of the value of $5,000 or more), there may be clear proof of a conspiratorial plan of sufficient scope to meet the statutory minimum, yet it may not be possible to prove the transportation or receipt of specific

items amounting in value to more than the requisite amount. The ability to prosecute for the conspiracy also has an important bearing on questions of venue, joinder, evidentiary rulings, and other facets of the law enforcement process.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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JANUARY 1974.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 997, 998, 999—September Term, 1972.

(Argued June 22, 1973 Decided July 13, 1973.)

Docket Nos. 73-1297, 73-1466, 73-1467

UNITED STATES OF AMERICA,

Appellee,

—against—

ENRIQUITO ALSONDO, RALPH FEOLA and HENRY ROSA,

Defendants-Appellants.

Before:

FRIENDLY, FEINBERG and MANSFIELD,

Circuit Judges.

Appeals from judgments of conviction after jury trial in the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *J.*, of assault against federal agents engaged in performance of official duties, in violation of 18 U.S.C. § 111, of conspiracy to violate that provision, and, as to one defendant, of carrying a deadly weapon during commission of a felony, in violation of 18 U.S.C. § 924(c)(2).

Conspiracy convictions reversed. Substantive assault convictions reversed and remanded as to Rosa, reversed with instructions to dismiss as to Feola, and affirmed as to Alsondo.

GEORGE J. BELLANTONI, White Plains, N.Y., *for Appellant Feola.*

SELIG LENEFSKY, New York, N.Y., *for Appellant Alsondo.*

JOSEPH I. STONE, New York, N.Y., *for Appellant Rosa.*

PAUL H. SILVERMAN, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York; Richard J. Davis, Assistant United States Attorney, on the brief), *for Appellee.*

FEINBERG, *Circuit Judge:*

After a jury trial in the United States District Court for the Southern District of New York before Charles L. Brieant, Jr., *J.*, appellants Enriquito Alsondo, Henry Rosa and Ralph Feola were convicted on charges that they had assaulted federal narcotics agents, while the latter were engaged in performance of official duties, in violation of 18 U.S.C. § 111, and that they had conspired to violate that provision, 18 U.S.C. § 371. Alsondo was also convicted on a third count charging the unlawful carrying of a deadly weapon during commission of a felony, in violation of 18 U.S.C. § 924(c)(2).[1] For reasons which follow, we reverse

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1 Alsondo was sentenced to three years on the substantive assault count (count two), and to eight years on the deadly-weapon count (count three), to run concurrently with each other and, according to Judge Brieant's recommendation, with Alsondo's present confinement under a state sentence; imposition of sentence on the conspiracy count (count one) was suspended, but Alsondo was given five years on probation, to commence upon expiration of his sentences on the other counts. Rosa was sentenced to concurrent three-year terms on counts one and two. Feola was sentenced on count one to four years, and on count two to three years on probation consecutive with his imprisonment, coupled with a $3,000 fine.

all convictions under the conspiracy count and dismiss that charge; we reverse the substantive assault conviction of Feola and direct that the indictment as to him be dismissed; we reverse the substantive assault conviction of Rosa and remand as to him; we affirm the convictions against Alsondo on the two substantive counts against him.

The facts may be stated briefly. On August 21, 1971, Agent Hall, while working in an undercover capacity, met Michael Farr[2] through an informer, at which time Farr promised to sell Hall a kilo of heroin supplied through appellant Ralph Feola. Ten days later, and accompanied by appellant Rosa, Farr met Hall and the informer, now joined by Agent Lightcap also acting in an undercover capacity. The five proceeded to an apartment on West 68 Street in Manhattan, where the agents were to purchase a half kilo of heroin for $17,000; Agent Hall had a "flash-roll" of cash with him, which he showed Rosa. When the group arrived at the apartment, Alsondo let them in. Agent Lightcap was given custody of the money and remained in the living room while Alsondo, Rosa and Farr ushered Hall and the informer into the bedroom. Alsondo pointed to packages of white powder, which he identified as the narcotics. (Upon subsequent testing, the substance proved to be powdered sugar.)

In rapid succession, Farr and Rosa left the bedroom; the informer requested a scale to "test" the substance the agents believed to be heroin; Alsondo left the bedroom, and Agent Hall, after opening a closet door and discovering a man bound and gagged,[3] followed Alsondo. Walking into

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2 Co-defendant Farr was indicted, tried with the three appellants, and convicted on counts one and two. He was sentenced at a later date under the provisions of the Youth Corrections Act, 18 U.S.C. § 5005 et seq. His appeal is pending, but as yet unargued.

3 The man was later identified as Nilo Tanderone, the lessor of the apartment.

the hallway, Agent Hall saw Agent Lightcap at the opposite end, facing Hall; Alsondo stood between them, facing Lightcap. Hall saw Alsondo reach behind his back and begin to pull a revolver from his waistband. Hall shouted a warning to Lightcap and identified the pair as federal agents; the two then subdued Alsondo after a scuffle and handcuffed him. Agent Lightcap thereupon walked into the living room and saw Rosa, who rushed toward him and shoved him in an apparent attempt to flee. Rosa was apprehended as was Farr, who had remained in the kitchen. Upon subsequent inspection of the premises, appellant Feola was discovered hiding in a closet and was arrested. At the time of arrest, Feola possessed a small telephone book containing the phone numbers of the West 68 Street apartment, of Farr and of Alsondo.[4]

The conspiracy count was submitted to the jury on the theory that an unlawful agreement among the four co-defendants could be inferred from the acts committed and circumstances as described above: The Government argued that the four had agreed to bilk the agents by fraudulently selling them sugar for $17,000 and had further agreed (or had foreseen the probable need) to rob the agents at gunpoint should the victims discover the swindle and attempt to thwart it. The district judge instructed the jury that proof of specific knowledge of the official identity of the assault victims was not required to establish a conspiracy to violate 18 U.S.C. § 111. He said:

> [I]t is not necessary for the government to prove that the defendants or any of them knew that the persons

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4 Later, while in custody, Feola made allegedly false exculpatory statements to an agent and to an Assistant United States Attorney. He argues that the statements should have been suppressed under *Miranda*, but, in view of our disposition, we need not consider the question. Nor need we decide whether the district judge abused his discretion in denying a severance to appellant Rosa.

> they were going to assault or impede or resist were federal agents. It's enough, as far as this particular element of the case is concerned, for the government to prove that the defendants agreed and conspired to commit an assault.

In so instructing the jury, the district judge appears to have relied on a line of cases beginning with *United States* v. *Lombardozzi*, 335 F.2d 414, 416 (2d Cir.), cert. denied, 379 U.S. 914 (1964), which hold that such knowledge or scienter is not a necessary element of the *substantive offense* under section 111. See, e.g., *United States* v. *Ulan*, 421 F.2d 787, 788 (2d Cir. 1970); *United States* v. *Montanaro*, 362 F.2d 527 (2d Cir.) (per curiam), cert. denied, 385 U.S. 920 (1966).[5]

The question remains, however, whether proof of such scienter is nevertheless necessary to convict of *conspiring* to violate section 111. In *United States* v. *Crimmins*, 123 F.2d 271 (2d Cir. 1941), we held that while knowledge that stolen securities had passed through interstate commerce was not a required element of the substantive offense under the statute there involved, such knowledge was a necessary element of proof of the crime of conspiring to cause stolen securities to be transported in interstate commerce. In a much-quoted passage, Judge Learned Hand stated:

> While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light,

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5 In analogous situations, we have held that specific knowledge of factual elements that confer federal criminal jurisdiction is not required for conviction of various substantive offenses. For example, as to knowledge of interstate transportation of stolen property, see, e.g., *United States* v. *Tannuzzo*, 174 F.2d 177, 180 (2d Cir.), cert. denied, 338 U.S. 815 (1949); as to knowledge of the federal capacity of officials to whom a bribe is proffered in violation of 18 U.S.C. § 201(b)(1), see *United States* v. *Jennings*, 471 F.2d 1310, 1312 (2d Cir.), cert. denied, 41 U.S.L.W. 3554 (U.S. Apr. 16, 1973).

> for one cannot agree to run past a light unless one supposes that there is a light to run past.

123 F.2d at 273. See also *United States* v. *Sherman*, 171 F.2d 619, 624 (2d Cir. 1948), cert. denied, 337 U.S. 931 (1949). We have frequently reaffirmed this distinction. E.g., *United States* v. *Vilhotti*, 452 F.2d 1186, 1189 (2d Cir. 1971), cert. denied, 406 U.S. 947 (1972) (conspiracy to buy, receive or possess chattels stolen from interstate commerce); *United States* v. *Jacobs*, 475 F.2d 270, 282 (2d Cir. 1973), petition for cert. filed, 41 U.S.L.W. 3596 (U.S. Apr. 30, 1973) (No. 72-1469) (conspiracy to deal in stolen securities which have moved or are to move interstate).

The *Crimmins* rationale has been criticized,[6] and it has been pointed out that if the federal interest involved in such statutes—e.g., the use of the mails, interstate transportation—were viewed "not as an element of the respective crimes but frankly as a basis for establishing federal jurisdiction," [7] then much of the problem before us would disappear. However, although the National Commission on Reform of Federal Criminal Laws has proposed this change,[8] Congress has not yet acted upon it. Absent legis-

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6 Developments in the Law—Criminal Conspiracy 72 Harv. L. Rev. 920, 938-39 (1959); I Nat'l Comm'n on Reform of Federal Criminal Laws, Working Papers 389 (1970).

7 ALI, Model Penal Code § 5.03, Comment, at 112 (Tent. Draft No. 10, 1960).

> No difficulty would in that event arise when the mails were actually used or a state line crossed in fact, whether or not this was within the contemplation of the parties; nor would there be a difficulty when this circumstance is planned, whether or not it actually has occurred. In situations where the jurisdictional circumstance neither exists nor was in contemplation of the parties, it would be clear that jurisdiction simply cannot be affirmed.

Id.

8 Final Report of the Nat'l Comm'n on Reform of Federal Criminal Laws, in Hearings before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary, 92d Cong., 1st Sess., pt. 1 (1971), at 224.

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fa
un hange, the recognition that specific knowledge of
st circumstances conferring federal jurisdiction is
ve sary to proof of the substantive offense under such
as but is required for proof of conspiracy remains
ch the law in this circuit and, apparently, elsewhere
st
in is view, the conspiracy convictions before us cannot
co t is true that we have found no case squarely rais-
in question whether scienter is required to convict for
ng to violate 18 U.S.C. § 111. This is not surpris-
ha st people—even those not inclined to be law-abiding
de not agree to assault a federal officer except per-
be incident to another, more serious crime. But the
cri f direct authority only emphasizes the great num-
vie nalogous cases already cited.[10] As applied to the
of before us, *Crimmins* and its progeny mandate the
to t specific knowledge of the official federal capacity
to lt victims must be proved to establish conspiracy
tha te section 111, though such proof is unnecessary
ct for the substantive offense. It might be possible
guish the *Crimmins* line of authority on the ground
interest of the federal government in protecting its

e cases cited in Model Penal Code § 5.03, Comment, at 111 n.55; *ed States* v. *Barnes*, 383 F.2d 287, 290-93 (6th Cir. 1967), cert. d, 389 U.S. 1040 (1968) (conspiracy to travel interstate or cause travel to promote unlawful activity in violation of 18 U.S.C. 2); *Nassif* v. *United States*, 370 F.2d 147, 152 (8th Cir. 1966) spiracy to convert goods from interstate commerce); cf. *Pereira* 1*nited States*, 347 U.S. 1, 12-13 (1954) (conspiracy, inter alia, to nails to defraud). But see *United States* v. *Roselli*, 432 F.2d 879, 2 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971) (conspiracy olate § 1952; scienter unnecessary).

e also *United States* v. *Hall*, 342 F.2d 849, 852 n.4 (4th Cir.), denied, 382 U.S. 812 (1965), where the court strongly implied that ter is a necessary element under 18 U.S.C. § 372, making it unlaw- o "conspire to injure [any officer of the United States] in his n or property on account of his lawful discharge of the duties of ffice."

officials against physical attack is so strong, cf. *Ladner* v. *United States*, 358 U.S. 169, 173-75 & n.3 (1958), that prosecutions under the general conspiracy statute may nonetheless be maintained even in the absence of specific anti-federal intent, at least when an assault has actually occurred. We do not believe, however, that the thrust of existing precedent can be so easily disregarded. Furthermore, requiring proof of scienter for a conspiracy to deal in stolen securities but not for a conspiracy to violate section 111 would create an anomaly: Federal prosecution of the former crime is made more difficult although the investigative resources of the federal system may be indispensable for coping with a large multi-jurisdiction conspiracy, cf. Developments in the Law—Criminal Conspiracy, supra note 6, at 938-39, while federal prosecution of the latter conspiracy is facilitated, although it is an offense likely to be localized and more amenable to control through state law enforcement systems.

Accepting the controlling precedents somewhat reluctantly, we must conclude that the instruction to the jury on the conspiracy count was erroneous. Although no exception was taken to the charge—indeed, no mention of the issue is made in the briefs submitted to us, nor was the question pursued at oral argument until we raised it from the bench[11]—we nonetheless believe that the charge constituted "plain error," Fed. R. Crim. P. 52(b), which we should notice sua sponte. Where there is a failure to charge an essential element of the offense, the error almost invariably affects "substantial rights" within the meaning of the rule. See *United States* v. *Fields*, 466 F.2d 119, 121

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11 We observe, in passing, that although the point was squarely posed from the bench, we have received no request from the Government to submit a supplemental brief, nor have we been favored with any correspondence directing us to any authority contrary to the result we reach.

(2d Cir. 1972); *United States* v. *Massiah*, 307 F.2d 62, 70-71 (2d Cir. 1962) (Hays, *J.*, concurring), rev'd on other grounds, 377 U.S. 201 (1964). And we note that improper jury charges under section 111 (particularly relating to elements of scienter) have been a fertile source for judicial willingness to invoke the "plain error" rule. E.g., *United States* v. *McKenzie*, 409 F.2d 983, 985-86 (2d Cir. 1969) (dictum); see *United States* v. *Young*, 464 F.2d 160, 164 (5th Cir. 1972); cf. *United States* v. *Rybicki*, 403 F.2d 599, 602 (6th Cir. 1968) (indictment charged obstruction, by threat of force, of IRS agents engaged in performance of their duties in violation of 26 U.S.C. § 7212(a)). Moreover, appellants do argue on appeal that the evidence of conspiracy was insufficient as a matter of law. While their focus is more general, it is quite clear from an examination of the record that the evidence was insufficient on the issue of scienter and that directed judgments of acquittal should have been granted when motions for that relief were timely made. Certainly, the necessary scienter could not be properly imputed to the alleged conspirators on the ground that they could reasonably have anticipated that the victims of their planned assault might be federal agents. Compare *United States* v. *Corallo*, 413 F.2d 1306, 1326-27 (2d Cir.), cert. denied, 396 U.S. 958 (1969) (conspirator knew that the likelihood of use of interstate phone calls was great); *Nassif* v. *United States*, supra note 9, at 153 (knowledge of interstate origin may be implied from proof of conspiracy so broad that conspirators were indifferent to the source of the goods). To the contrary, it is altogether unlikely that would-be swindlers would knowingly select federal officers as the targets of their fraudulent scheme or would knowingly assume even the most remote risk of such occurrence.

Having concluded that no conspiracy prosecution can be maintained on the facts of this case, we turn to the sub-

stantive convictions. Relying on *Pinkerton* v. *United States*, 328 U.S. 640 (1946), the trial judge submitted the substantive assault charge against Feola to the jury solely on the theory that while he committed no act of force himself—having been in a closet throughout the events in question—if he had nevertheless joined with Alsondo and the others in an unlawful conspiracy, then as a co-conspirator he might be held responsible for criminal acts committed in furtherance of the unlawful agreement. Id. at 647. Since the judge evidently and, we think, rightly believed that this was the only basis upon which the jury could properly convict Feola of the substantive offense, his conviction must be reversed and the charge dismissed where the predicate conspiracy conviction cannot stand.

Likewise, the substantive conviction against Rosa must be reversed. The district judge submitted this count to the jury on two alternative bases. The first authorized the jury to convict Rosa

> based on his own actions, if you find that he raised his hand against the agent . . . and moved toward the door and did so wilfully and intentionally with the purpose of resisting arrest or assaulting the officer or in any way impeding or interfering with his duties.

There was sufficient evidence, if believed, to establish commission of an assault or an otherwise prohibited act by Rosa. Lightcap identified himself to Rosa as a federal agent, thus foreclosing any contention of even momentarily lawful resistance, cf. *United States* v. *Heliczer*, 373 F.2d 241, 248-49 (2d Cir.), cert. denied, 388 U.S. 917 (1967), or at least permitting the jury to find otherwise. Rosa thereafter lifted his hand menacingly, as though to shove Lightcap, and did in fact shove him—both acts sufficient to constitute a crime under section 111. See, e.g., *United States* v. *Bamberger*, 452 F.2d 696, 699 (2d Cir. 1971),

cert. denied, 405 U.S. 1043 (1972). Nevertheless, our reversal turns on the judge's alternative instruction, again grounded on *Pinkerton*, supra, which permitted the jury to convict Rosa of the substantive crime

> by reason of the actions of Alsondo, if you find that Alsondo assaulted the federal officers or either of them in furtherance of the conspiracy, . . . and while Rosa was a member of the conspiracy. . . .

Since we have no way to determine on which theory the jury did in fact convict, we must reverse the conviction on this count. See *Mills* v. *United States*, 164 U.S. 644, 649 (1897); *Nicola* v. *United States*, 72 F.2d 780, 787 (3d Cir. 1934). As the evidence was sufficient to convict on the assault count even in the absence of the erroneous instruction, however, we do not order dismissal but remand for a new trial.

Alsondo's conviction on the substantive assault count stands in a wholly different posture. There is no good reason to believe that his conviction was tainted by any erroneous alternative instruction, for none was given.[12] His contention that, in other respects, the evidence was insufficient to permit the jury to find guilt beyond a reasonable doubt is wholly unpersuasive. Alsondo challenges the testimony that he had attempted to draw his revolver on Agent Lightcap in the hallway, but this was a question of credibility for the jury. He further argues that Agent Lightcap, facing appellant in the hallway, was never put in fear of battery by any act of Alsondo's. However, Agent Hall testified that he had shouted a warning to his colleague, and Lightcap testified that he was placed in fear

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12 The judge charged that:

> Insofar as concerns Alsondo, he may be found guilty on the substantive count, Count Two, if it is shown that he assaulted a federal agent, either Lightcap or Hall.

of bodily harm as a result of the warning. In any event, the jury could infer that from his own observations, Lightcap had perceived Alsondo's acts as constituting an immediate threat of physical injury.[13]

The conspiracy convictions are reversed and the conspiracy count is dismissed as to all appellants; the substantive assault conviction of Feola is reversed and the count is dismissed as to him; the assault conviction of Rosa is reversed and remanded for further proceedings consistent with this opinion; the conviction of Alsondo on two substantive counts is affirmed.

13 With respect to count three—charging possession of a deadly weapon during commission of a felony—Alsondo argues that since "the gun possession is not a federal offense, the third count cannot stand alone." Since Alsondo's conviction on the principal substantive count is affirmed, the argument is without merit, and we affirm his conviction on the third count.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 997, 998, 999—September Term, 1972.

(Decided November 19, 1973.)

Docket Nos. 73-1297, 73-1466, 73-1467

UNITED STATES OF AMERICA,

Appellee,

—against—

ENRIQUITO ALSONDO, RALPH FEOLA and HENRY ROSA,

Defendants-Appellants.

Before:

FRIENDLY, FEINBERG and MANSFIELD,

Circuit Judges.

ON PETITION FOR REHEARING

PAUL J. CURRAN, United States Attorney for the Southern District of New York; Jed S. Rakoff, John D. Gordan III and John W. Nields, Jr., Assistant United States Attorneys, *for Appellee.*

GEORGE J. BELLANTONI, White Plains, N.Y., *for Defendant-Appellant Feola.*

JOSEPH I. STONE, New York, N.Y., *for Defendant-Appellant Rosa.*

FEINBERG, *Circuit Judge:*

On July 13 of this year, we reversed in part a judgment of the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *J.*, convicting Enriquito Alsondo, Ralph Feola and Henry Rosa of assault on federal narcotics agents, in violation of 18 U.S.C. § 111, and conspiracy to violate that provision, 18 U.S.C. § 371.[1] At issue now is our disposition of the cases of Feola and Rosa. With respect to the conspiracy convictions, we reversed and dismissed the count. Regarding the substantive assault convictions, we also reversed; we dismissed as to Feola, but remanded Rosa's case for a new trial.[2] Our prior opinion sets forth the underlying facts.

The Government has sought a rehearing of the reversal of the assault convictions of Feola and Rosa. (The Government does not at this time challenge the doctrine of *United States* v. *Crimmins*, 123 F.2d 271 (2d Cir. 1941), under which we dismissed the conspiracy counts; that part of the judgment therefore stands.) We asked for, and received, briefs from both sides on the issues. For reasons stated below, we grant the petition for rehearing and affirm Feola's and Rosa's convictions of assault against federal agents.

In our prior opinion, we assumed that reversal of the conspiracy convictions for failure to prove knowledge of the intended victims' official character necessarily vitiated the substantive assault convictions since a *Pinkerton* charge

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1 Alsondo was also convicted under 18 U.S.C. § 924(c)(2) of unlawfully carrying a deadly weapon during the commission of a felony.

2 Alsondo's conspiracy conviction was likewise reversed and the charge dismissed; his convictions on the substantive counts were, however, affirmed.

had been given.[3] Upon the further reflection induced by the Government's petition, however, we believe that this conclusion was not justified on the facts of this case. It is well established in this and in other circuits that the admissibility of acts of a joint criminal venturer against his partner in crime "rests on basic principles of agency and not on the presence of a conspiracy count."[4] *United States* v. *Granello*, 365 F.2d 990, 995 (2d Cir. 1966) (Friendly, *J.*), cert. denied, 386 U.S. 1019 (1967). Similarly, the out-of-court declarations of a co-conspirator are admissible against a defendant where joint venture is shown by the evidence, although conspiracy is not alleged in the indictment. *United States* v. *Annunziato*, 293 F.2d 373, 378-81 (2d Cir.), cert. denied, 368 U.S. 919 (1961); *United States* v. *Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945). Cf. *United States* v. *Jacobs*, 475 F.2d 270, 281 n.25 (2d Cir. 1973).

At various points in the charge, the lower court referred to a conspiracy to assault a federal agent or to violate 18 U.S.C. § 111, as well as to a conspiracy to obtain the buyers' money by fraud or force.[5] Therefore,

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3 *Pinkerton* v. *United States*, 328 U.S. 640 (1946), held that a conspirator was liable for the reasonably foreseeable crimes committed by a co-conspirator in furtherance of and during the venture.

4 See, e.g., *Davis* v. *United States*, 409 F.2d 1095, 1100 (5th Cir. 1969); *United States* v. *Messina*, 388 F.2d 393, 394-95 (2d Cir.), cert. denied, 390 U.S. 1026 (1968); *United States* v. *Jones*, 374 F.2d 414, 418 (2d Cir.), cert. denied, 389 U.S. 835 (1967); *United States* v. *Smith*, 343 F.2d 847, 849 (6th Cir.), cert. denied, 382 U.S. 824 (1965).

5 Whereas the former theory is untenable in light of *Crimmins*, the latter is clearly viable. This juxtaposition of correct and erroneous instructions does not necessitate reversal since, on any sensible view of the matter, the jury on these facts could not have found a conspiracy to assault a federal officer without in addition finding a conspiracy simply to assault or to get the money by fraud or force. *United States* v. *Jacobs*, 475 F.2d 270, 282-84 (2d Cir. 1973).

on these facts the jury's finding against defendants on the conspiracy count has a controlling effect on the substantive counts of assaulting a federal officer. With regard to the latter, the jury must already have found an agreement—involving Feola—to assault a victim (who turned out to be a federal officer) or to take money from him by fraud or force. In the absence of such a finding, the jury could not have convicted Feola since both the evidence and the charge pointed to Alsondo and Rosa as the only possible assailants. Rosa's case parallels Feola's except that the jury could, pursuant to the charge, have found the former personally rather than vicariously guilty of assaulting a federal agent.[6] This finding of criminal agreement is sufficient, on general agency principles, to sustain defendants' liability for their co-conspirators' actions.[7] Under *Pinkerton*, supra, there are circumstances where a co-conspirator may be held liable as part of a conspiracy of indefinite scope and duration for a specific crime which he should have foreseen but perhaps did not. This is not such a case. The jury's finding makes clear that Feola and Rosa were part of a plot to commit the crime that actually occurred. On such facts, the finding of guilt as to each should stand.[7]

We therefore grant the Government's petition for a rehearing and affirm the assault convictions of Feola and Rosa. The judgment is modified in accordance with this opinion.[8]

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6 The record supports a conviction of Rosa as principal, if this in fact occurred.

7 P. Johnson, The Unnecessary Crime of Conspiracy, 61 Calif. L. Rev. 1137, 1146 (1973).

8 We have also considered the remaining arguments raised by defendants Feola and Rosa in their original briefs and find no reason why the assault convictions should not be affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 73-1297—73-1466-7

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of November, one thousand nine hundred and seventy-three.

Present: Hon. HENRY J. FRIENDLY, Hon. WILFRED FEINBERG, Hon. WALTER R. MANSFIELD, *Circuit Judges.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

—against—

ENRIQUITO ALSONDO, MICHAEL FARR, RALPH FEOLA, HENRY ROSA, *Defendants-Appellants.*

A petition for rehearing having been granted, additional briefs having been filed and reconsideration having been given without further oral argument.

Upon consideration thereof, it is

Ordered that the judgment of this Court of July 13, 1973 be and it hereby is modified in accordance with the opinion of this Court of November 19, 1973.

A. DANIEL FUSARO,
Clerk.